NO. 83-958

IN THE
Supreme Court of the United States

OCTOBER TERM 1983

PORT OF TACOMA,

Petitioner,

vs.

PUYALLUP INDIAN TRIBE

Respondent.

MOTION TO FILE AMICUS CURIAE BRIEF BY WASHINGTON LAND TITLE ASSOCIATION AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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COMES NOW the Washington Land Title Association and files this, its Motion for Leave to File the attached amicus curiae brief and Motion in Support of the Port of Tacoma's Petition for Certiorari. Movant states:

The Washington Land Title Association is an association of title insurance companies whose members insure land titles within and adjacent the external boundaries of approximately 24 Indian reservations or former reservations in the State of Washington. All the reservations include lands adjacent navigable waters. Many abut tidelands long ago deeded into private ownership by the State of Washington which are now being asserted by tribes, including the Puyallup Indian Tribe, to have been impliedly included within the external boundary of their reservations.

Movant has a direct interest in the issues involved in this proceeding because of

the great importance of certainty where issues to record ownership of real property are involved. The rule of law announced by the Ninth Circuit in this and in the companion case, Muckleshoot Indian Tribe vs. Transcanada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), appears to be in direct conflict with the teaching of this court in Montana vs. United States, 450 U.S. 544 (1981).

While the instant decision affects 12 acres of land, approximately 200 additional acres of industrialized former Puyallup river bottom land are directly effected. Indirectly long-established titles derived from the State of Washington to numerous other parcels of real estate resulting from rechannelization of rivers and filling of tidelands bounding or within the boundaries of reservations will be uncertain and in jeopardy unless this court grants certiorari and reviews the instant case in

light of the court's decision in Montana, supra. The Ninth Circuit has invited this court's review of its interpretation of the Montana decision.

> Given the importance of certainty where issues of ownership of land are involved, the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.
>
> United States vs. State of Washington, 694 F.2d 188, 189 (9th Cir. 1982), referring to Confederated Salish and Kootenai Tribes vs. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied 103 S.Ct. 314 (Rehnquist, J., dissenting).

Movant has received written consent of the Port of Tacoma to file an amicus brief, but has not yet received the consent of the respondent, Puyallup Indian Tribe.

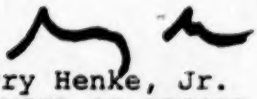
CONCLUSION

The Washington Land Title Association believes that the Ninth Circuit has incorrectly interpreted this court's teaching in Montana, supra, in both this and the companion Muckleshoot case and urges that the

decisions below be reviewed by this court. Accordingly, movant respectfully moves that the petitioner's Petition for Writ of Certiorari be granted and that it be permitted to file its Amicus Curiae brief herein.

Respectfully submitted,

SKEEL, HENKE, EVENSON & ROBERTS



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INTRODUCTION

In this action, the Court of Appeals held that, in view of the same tribal dependence on the Puyallup River addressed by Article III of the Treaty of Medicine Creek (10 Stat. 1132 (1854)), the 1857 Executive Order relocating the Puyallup reservation must be interpreted as including a grant to the tribe of the bed of the river flowing through it. The Order described it only by reference to Stevens' diagram of its proposed boundaries (January 20, 1857, reprinted at 1 Kappler 920). Such a grant was, if made, contrary to the historic practice of the Federal government to hold the land below the high-water mark along navigable waters for the future states unless a public exigency required it be conveyed. Shively vs. Bowlby, 152 U.S. 1 (1893). That practice is reflected in the presumption that a

pre-statehood grant should not be interpreted to include the conveyance of the bed of a navigable water "unless the intention was definitely declared or otherwise made plain." Montana vs. United States, 450 U.S. 544, 552 (1981), quoting United States vs. Holt State Bank, 270 U.S. 49, 55 (1926).

A specific provision of each of the treaties of 1854 and 1855 with the Indian Tribes of Western Washington[1] secured to the party tribes the "right of taking fish, at all ususal and accustomed grounds and stations . . . in common with all citizens of the territory." 10 Stat. 1133; see, generally, Washington vs. Fishing Vessel Association, 443 U.S. 658 (1979). Each tribe has a class right to a share up to one-half of the total harvest of each anadromous fish

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[1] Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point No Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); and Treaty of Olympia (12 Stat. 971).

run sufficient for the subsistence and ceremonial needs of its members and for their livelihood, together with the concomitant right to access to the fishing grounds. Both the tribe's allocation of the harvest and its right of access to the traditional grounds are independent of the place of taking, on reservation or off. Id. at 687-9; United States vs. Winans, 198 U.S. 372 (1904). In particular, the right of the Puyallup Tribe to fish on the Puyallup River is a function of Article III. Puyallup Tribe vs. Washington Game Department cases, 391 U.S. 392 (Puyallup I); 414 U.S. 44 (Puyallup II); 433 U.S. 165 (Puyallup III). This key treaty provision addresses the same tribal concerns which were central to the decision of the court below, but it was not considered pertinent in the court's opinion.

I. Inference of a grant of title in the bed of a navigable water is not permitted absent specific treaty language or a clear promise in the treaty negotiations indicating that intent.

The inference of a grant to a Tribe of the fee interest in the bed of a particular watercourse in order to protect its dependence on the fishery therein is illogical, where the tribe already has a separate guarantee of those fishing rights. In the context of such a guarantee, access to the water and exclusive possession of the land around it is now and was in 1857 entirely sufficient to meet that concern.

The most tenuous such inference this court has made was in Choctaw Nation vs. Oklahoma, 397 U.S. 620 (1970). See Montana, 450 U.S. 544, 567-9 (J. Stevens, concurring). In that case the court relied on a specific promise that "no part of the land granted to them shall be embraced in any future territory or state." Supported by a history of dispossession from previous reserves

(without analogy here), that promise was held to permit an inference that the bed of a navigable water in the reservation was within the grant. The court in Montana stressed the absence of any similar promise or history, 450 U.S. at pages 555-6, note 5, and there is no similar promise or history present in this case.

Likewise, in this case the record reveals no circumstances which would logically give particular reference to submerged land to a promise that the reservation be "sufficient for [the tribe's] wants." Such a promise was the factor which the 9th Circuit held crucial in Moore vs. United States, 157 F.2d 670, 672 (1946). That promise in Moore was given flesh by the recognized dependence by the Quillayute Tribe on the title lands and bed of the Quillayute River for their primary subsistence and for the development of a recognized commercial tribal industry (for seal skins and whaling,

as well as salmon curing and smoking). Absent here is any promise of economic sufficiency to be derived from particular shoreland in the reservation, apart from the resources guaranteed by the fishing rights treaty clause to the tribe in all the waters inside and outside the reservation. Nor do the circumstance supply such a reference to the general promise made of "a reservation on the Puyallup." There is no evidence of any Puyallup Tribal industry in historical times requiring particular and recognized use of land below the high water mark, as was the case in Moore and, that case emphasized, in Alaska Pacific Fisheries vs. United States, 248 U.S. 78 (1918). See Moore, 157 F.2d at page 762. This case is parallel in this respect to Skokomish Indian Tribe vs. France, 320 F.2d 205, 212 (9th Cir. 1963).

The Court of Appeals below apparently relied on Alaska Pacific Fisheries for the conclusion that a public exigency alone,

without any promise or language to suggest a specific grant of submerged land in answer to it, may support the inference that the tideland was conveyed in a general reservation designation. The Act there construed the description of the reserve for an Alaska tribe as "the body of lands known as Annette Islands." Those words would include these within the ordinary meaning of the name of the group of islands used in the Act to designate the reserve. There was no provision in the Act analogous to Article III. The exclusive right to use that shore and intervening waters was essential to a recognized developing commercial industry and the primary means of subsistence from the adjacent fishery. 248 U.S. at pages 88-9.

By contrast, in this case the language of the Executive Order of 1857 on which the Puyallup Tribe relies is a mere reference to a diagram which showed the river in and out

of the proposed reserve along with other geographic markes naturally appearing on such a map. That order does not permit an inference such as that drawn in the Alaska Pacific Fisheries case, nor is such an inference supported by circumstances pointing to particular dependence upon the land below the high-water mark in issue.

This court in Montana held the treaties with the Crow Tribe setting apart certain land bounded by the Yellowstone River for their undisturbed use and occupation did not, by mere reference to exclusive use of a general area, express any intention to grant the banks of the river with sufficient clarity to overcome the Holt State Bank presumption. 450 U.S. at page 543-544. The court then went on to state an alternative ground for its holding, which the 9th Circuit has apparently taken in this case to be the only ground, the absence of public exigency requiring such a grant.

In Shively vs. Bowlby, supra, the court did note that historically a public exigency was required for Congress to depart from its policy of reserving ownership of beds under navigable waters for the future states. 152 U.S. at page 48. The Montana opinion, at 450 U.S. 556, notes the absence of any such public exigency and cites the Alaska Pacific Fisheries case as an instance where such an exigency was presented and the Skokomish case as an instance where such an exigency was absent.

The 9th Circuit's opinions in this case and in the companion case, Muckleshoot Tribe vs. Transcanada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), Petition for Certiorari pending as No. 83-833, express the clear holding, contrary to Montana, that no express reference to the bed beneath navigable waters is necessary to find such a grant in the

designation of a reservation. The court held

> Where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.
>
> Opinion at pages 15-16, quoted and followed in Muckleshoot at 717 F.2d at 458.

The citation in Montana of the Alaska Pacific Fisheries and Skokomish cases to illustrate the presence and absence of such an exigency as discussed in Shively was misinterpreted by the Court of Appeals to state an alternative holding which simply was not present in this court's opinion.

Montana was a negative holding. A conveyance of land around a navigable waterway to a tribe would not be construed to include the bed of that waterway if there was no express grant and there was no public

exigency which in the circumstances required the inference of intent to grant the bed of the waterway along with the land around it. Montana did not hold that the rest of the treaty language may be ignored in determining whether such an inference was necessary.

Montana did not suggest that such an implication would be permitted where the exigency relied on, such as dependence on the fishery, was expressly addressed by a separate grant such as Article III of the Treaty of Medicine Creek. On the contrary, the court in Montana carefully examined the prior history of treaties between the Crow Indians and the United States in addition to the recognized needs of the Indians which the subject treaty might be presumed to concern. This teaching by example in Montana was ignored by the courts below.

The Court of Appeals holding in the case will require courts in this circuit in the future to disregard such vital circumstances

importance of the bed, as distinguished from the waterway generally.

The State of Washington has conveyed title to land below the high-water mark, both tidal and non-tidal, in reliance upon the holding of Holt State Bank that the designation of a reservation does not include a grant of land below the high-water line unless specific reference to that land is made. In Montana, this court reaffirmed Holt State Bank as a rule of property. This court should grant certiorari and reverse the Court of Appeals in order to preserve that rule of property and protect the rights of parties relying on it.

> Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.
>
> Minnesota Mining Co. vs. National Mining Co., 3 Wall 332, 334, 18 L.Ed. 42, cited in United States vs. Title Insurance and Trust Company, 265 U.S. 472, 486 (1924).

II. The promise of a reservation "on the Puyallup" does not indicate an intent to grant to the tribe the bed of that watercourse.

As evidence of the government's intent to convey the riverbed, the Court of Appeals and trial court cited evidence of statements by the representatives of the Tribe and Governor Stevens at the conference held at Fox Island in 1856. That conference followed the end of brief hostilities between the Puyallup and other tribes and non-Indian settlers in that and the previous year. (The minutes appear as Plaintiffs Ex. 3, Supp. Exc. of Record pp. 4-6.) Members of the tribe expressed to Governor Stevens their wish "to have a reservation on the Puyallup." Governor Stevens promised that they should "have . . . one large reservation on the Puyaloop [sic]." Court of Appeals Opinion at 18, citing the trial court at 525 F.Supp. 65, 728 (W.D.Wash. 1981) [Finding of Fact 13, Exc. of Record at page 18].

The Puyallup Tribe's desire and the governor's promise expressed at Fox Island relate to the river and the size of the reserve. Those statements cannot rationally be read to be a direct request for or promise of title to the bed of the Puyallup River, as distinguished from access to it, in view of the prior property rights in the river expressly granted to the Tribe by Article III as interpreted generally in Winans and Washington vs. Fishing Vessell Association and specifically with reference to this Tribe and this river in the Puyallup Tribe vs. Washington State Game Department cases.

There was no dispute as to the relevant facts in the trial court. The Indians did depend on fish and many of their ceremonies and religious beliefs focused on the river. The river was a part of the accustomed grounds and stations to which the Tribe was guaranteed access and use in Article III of

the 1854 treaty. United States vs. State of Washington, 384 F.Supp. 312, 371 (W.D. Wash. 1974) (Finding of Fact 99). They built fish traps and weirs on the riverbanks and bed of the Puyallup River, but these structures were swept away by the spring tides and rebuilt each year. (Finding of Fact 17, Exc. of Record p. 17.) After the treaty, the Tribe, along with many other Tribes in Western Washington, engaged in sporadic hostilities for about a year with non-Indian settlers, which had many causes, of which one was dissatisfaction with their original smaller reservation further south on Commencement Bay on rocky land apart from the river. (Finding of Fact 11, Exc. of Record p. 18; P.T.O. Uncontested Fact 17, Exc. of Record p. 34.) The Fox Island Council followed at which the noted statements were made, the Commissioner of the Office of Indian Affairs received and forwarded with approval Governor Stevens' proposal for the enlargement of the reserve

on Commencement Bay and the President approved that proposal on the recommendation of the Secretary of the Interior January 20, 1857. (P.T.O. Uncontested Facts 18-24, Exc. of Record p. 35-8.)

> The principal fishing places of the Puyallup Indians were located in the area ceded by these Indians under the Medicine Creek Treaty as well as the area subsequently set aside pursuant to the treaty for their exclusive use as the Puyallup Indian Reservation. The land set apart as the Puyallup Reservation as a result of Governor Stevens' 1856 recommendation for relocation of the reservation also was intended to encompass usual and accustomed freshwater fishing sites, and to provide access to traditional fisheries in Commencement Bay for those Indians who were brought to the reservation.
>
> United States vs. State of Washington, supra, (Finding of Fact 98).

These undisputed facts do not support any finding that Governor Stevens even obliquely promised (or that the President, in approving Governor Stevens' proposed reservation, expressed) a further grant to

the Puyallup Tribe of property rights in the riverbed specifically to protect their right to fish in it, as distinguished from enlarging the area of their reservation and placing that reservation around the river which was their traditional home.

III. Article III of the Treaty of Medicine Creek is an express grant of property rights in the Puyallup Riverbed.

In Article III of the Treaty of Medicine Creek, the government had given this Tribe a property right in the banks of the Puyallup river, along with other traditional fishing grounds, to have access to the fishery resource there. Puyallup Tribe vs. Washington State Game Department cases, supra; United States vs. Winans, 198 U.S. 371 (1904). That treaty right was recognized as a grant of a property right meeting the test of the presumption against such pre-statehood grants of rights below the high-water mark

along navigable waters established in Shively vs. Bowlby, supra. The court stated that the extinguishment of Indian title in exchange for, inter alia, the right of taking fish at all usual and accustomed places, was a public purpose for which the Federal government could make such a grant and that in the treaty provision such a grant had been expressly made. 198 U.S. at 381.

The right to take fish and the right of access to traditional fishing grounds are not so essential to the bundle of rights known as fee title that they cannot be severed from fee title in a riverbed (the ability of the Tribe to make other uses of the river follow as an incident of the federal right of navigation). In this case, those rights were severed and granted to the Puyallup Tribe by Article III of the Treaty of Medicine Creek and the Tribe's use of those rights, along with all of its other uses of the Puyallup

River, were made convenient by placing the reservation around the river. The exigency relied on by the courts below, the requirement of meeting the Tribe's needs to the river, were thereby completely met and the limited property rights in the river necessary to meet it were completely severed from the remaining fee title to the bed. In these circumstances, the Executive Order cannot be read to express an intent contrary to the treaty which it implemented. The treaty and the Executive Order of 1857, read together, plainly withhold a grant to the Puyallup Tribe of fee title to the bed of this navigable waterway and reserve that bed for the future State of Washington in accord with the historical practice of the United States.

CONCLUSION

For the foregoing reasons, amicus curiae requests that a Writ of Certiorari be issued

to review the judgment and opinion of the Ninth Circuit.

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